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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

(OAKLAND DIVISION)

MEIJER, INC. & MEIJER DISTRIBUTION, INC., on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

ABBOTT LABORATORIES,

Defendant.

--[*caption continues next page*]--

Case No. C 07-5985 CW

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

Date: **March 6, 2008**
Time: **2:00 p.m.**
Courtroom: **2 (4th Floor)**
Judge: **Hon. Claudia Wilken**

ROCHESTER DRUG CO-OPERATIVE, INC., on behalf of itself and all others similarly situated,

Plaintiff,

v.

ABBOTT LABORATORIES,

Defendant.

Case No. C 07-6010 CW

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

Date: March 6, 2008
Time: 2:00 p.m.
Courtroom: 2 (4th Floor)
Judge: Hon. Claudia Wilken

LOUISIANA WHOLESALE DRUG COMPANY, INC., on behalf of itself and all others similarly situated,

Plaintiff,

v.

ABBOTT LABORATORIES,

Defendant.

Case No. C 07-6118 CW

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

Date: March 6, 2008
Time: 2:00 p.m.
Courtroom: 2 (4th Floor)
Judge: Hon. Claudia Wilken

DIRECT PURCHASER CLASS PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

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The plaintiffs (hereinafter the "direct class plaintiffs" or "plaintiffs") in the Consolidated Amended Complaint (hereinafter the "complaint" and cited as ("¶ ___")) hereby submit this joint opposition to the motion to dismiss (cited as "Abbott Mot.") filed by defendant Abbott Laboratories ("Abbott") against counts and claims alleged by the direct class plaintiffs only. Abbott has also separately filed an "Omnibus Motion to Dismiss Plaintiffs' Sherman Act Claims Pursuant to Rule 12(b)(6)," seeking to dismiss the claims of several plaintiff groups, including the direct class plaintiffs. The direct class plaintiffs respond to the Omnibus Motion separately by way of Plaintiffs' Joint Omnibus Opposition to Defendant's Motion to Dismiss ("Omnibus Opposition"), which is incorporated herein by reference. For the reasons set out below (and in the Omnibus Opposition), Abbott's motions to dismiss should be denied.

SUMMARY OF ARGUMENT

The proposed class of direct-purchaser plaintiffs consists mainly of pharmaceutical wholesalers and retailers who purchased Norvir and Kaletra, brand name pharmaceuticals that treat HIV, directly from defendant Abbott. (¶¶ 1-3, 47-56.) Direct class plaintiffs allege that they were overcharged on these purchases because, *inter alia*, Abbott has engaged in anti-competitive conduct designed to preserve and extend its monopoly power in the market for boosted protease inhibitors (the "boosted market"). By quadrupling the price of Norvir overnight, Abbott leveraged its monopoly in protease inhibitor boosters (the "boosting market") to obtain and/or attempt to obtain monopoly power in the boosted market by impairing rivals to Abbott's Kaletra product (which combines Norvir with lopinavir, Abbott's boosted protease inhibitor). In addition, direct class plaintiffs allege further, and separately, that Abbott also engaged in illegal anticompetitive behavior to protect its Norvir monopoly in the boosting market in advance of, and in furtherance of, Abbott's scheme to monopolize the boosted market. (¶¶ 15, 18, 26-33, 34-37.) As a result of this conduct, the direct class plaintiffs and other similarly-situated direct purchasers paid more for Norvir and Kaletra than they would have otherwise paid, and were damaged thereby. (¶ 42.)

Abbott now moves to dismiss the complaint. It does so despite this Court's prior determinations that (a) Abbott's exclusionary conduct in the form of monopoly leveraging states a

claim for violation of Section 2 of the Sherman Act under, *e.g.*, *Image Tech. Servs. v. Eastman Kodak Co.*, 125 F.3d 1195 (9th Cir. 1997), and (b) after years of investigation, Abbott's behavior presents triable issues of fact. (*See* Order Denying Defendant's Renewed Motion for Summary Judgment, filed July 6, 2006, in No. Civ. 04-1511 CW.)

Abbott's arguments depend on convincing the Court that the recent case of *Cascade Health Solutions v. PeaceHealth*, --- F.3d —, 2008 WL 269506 (9th Cir. February 01, 2008) ("*Cascade*"),[1] has re-interpreted the federal antitrust laws such that the very same allegations of exclusionary monopoly leveraging, which this Court has repeatedly found make out a cognizable antitrust claim, are now somehow insufficient to survive a motion to dismiss.

Abbott's *Cascade* argument is wrong. Plaintiffs refer the Court to their separately filed Omnibus Opposition for their (and the other plaintiff groups') joint refutation of Abbott's *Cascade* motion. The Omnibus Opposition explains why *Cascade*—a case concerning price-cutting in the form of bundled *discounts*—is inapplicable here in a case about the exclusionary effects of a massive price *increase*. As explained in the Omnibus Opposition, the more stringent cost-based test articulated in *Cascade* addressed the Ninth Circuit's narrow concern that, because discounts typically benefit consumers, the traditional Section 2 analysis might be "too quick to condemn price-reducing bundled *discounts* . . ." by a monopolist. *Cascade*, 2008 WL 269506 at *6 (emphasis added). The Court need look no further than the arguments in the Omnibus Opposition to deny Abbott's motion.

Accordingly, as discussed in the Omnibus Opposition, the more stringent, cost-based, test for assessing the exclusionary effects of bundled *discounting* set out in *Cascade* need not be satisfied here because this case is not about discounting. Nevertheless, meeting the more stringent *Cascade* test would provide a separate and independent basis to find that Abbott's conduct was improperly exclusionary and had an impermissible anticompetitive effect. After

[1] On February 1, the Ninth Circuit issued an amended opinion superseding its prior decision at 502 F.3d 895. The new decision reflects the fact that the Ninth Circuit has certified a question of state law to the Oregon Supreme Court. The opinion remains unchanged as it relates to the federal claims.

conducting a good faith analysis of the facts and circumstances available to them, direct class plaintiffs believe that they can satisfy the more stringent *Cascade* test. Thus, plaintiffs specifically alleged in paragraph 41 of their complaint that, while meeting *Cascade* is unnecessary, *if* the conduct were analyzed as if it were, *arguendo*, bundled discounting, and *if* Kaletra (which contains both Norvir *and* Abbott's boosted product (lopinavir)) were considered a discount bundle, Abbott's conduct would exclude an equally efficient competitor, and fail the *Cascade* test. (¶ 41.)

In essence, instead of responding to competitive threats to Abbott's Kaletra product by improving its quality, or lowering its price, Abbott has used its Norvir monopoly to harm rivals in the boosted market, and make it impossible for competitors to steal share through price competition. Even if Abbott's rivals were to lower their prices to better compete with Kaletra, Abbott would need only to inflate further the price of Norvir to nullify the ability of the lower-priced competitors to steal share from Kaletra. Seen from a different angle, as plaintiffs have alleged, by penalizing purchasers for buying Norvir as a stand-alone product (as opposed to buying it as part of the Kaletra combination product), Abbott was effectively selling the lopinavir (boosted) portion of Kaletra below its costs. As a result of Abbott's leveraging of its Norvir monopoly, therefore, rivals could not possibly compete with Abbott on price. In this way, Abbott has harmed rivals and eliminated price competition, not by competing on the merits, but rather by improperly exploiting its monopoly in the boosting market.

Therefore, even if the Court were to (wrongly) accept Abbott's Omnibus Motion to Dismiss in its entirety, the Court would nonetheless be obliged to allow the direct class plaintiffs' claims to go forward under *Cascade*. Abbott's motion to dismiss against the direct class plaintiffs also fails to explain why plaintiffs' separate and distinct allegations relating to monopolization of the boosting market should be dismissed at the pleadings stage.

Each of Abbott's principal arguments in support of its motion against the direct class plaintiffs is without merit.

First, Abbott argues that the Court should simply disregard plaintiffs' allegations that the *Cascade* test is satisfied. Abbott hangs its argument on a supposed lack of specificity,

citing *Bell Atlantic Corporation v. Twombly*, 127 S. Ct. 1955 (2007). This argument is frivolous. As explained in Part I below, *Twombly* does not require plaintiffs to prove every aspect of their case at the pleading stage; it only requires them to allege enough facts to put Abbott on notice of the case against it—which plaintiffs clearly have. Plaintiffs have alleged, *inter alia*, the date of the price increase at issue, its amount, its harmful effect on competition in the boosted market, and to competition generally, its beneficial effect on Kaletra's market share and in enhancing and/or maintaining Abbott's monopoly power, and, importantly, the specific satisfaction of the "discount allocation" criteria set forth in *Cascade*. Such specificity is more than is required at the pleading stage.

Moreover, Abbott's main argument is, in essence, that plaintiffs did not plead facts about Abbott's own average variable costs with more specificity. Yet, neither *Twombly*, nor *Erickson*, nor *Cascade*, nor any other case, supports the proposition that a plaintiff should be denied all remedy for facially anticompetitive behavior simply because it did not do the impossible: obtain access to the defendant's confidential, internal, proprietary cost data *before* filing a complaint. Indeed, if the rule Abbott seeks to impose became law, *Cascade* would effectively immunize conduct that the Ninth Circuit believed was clearly harmful to competition because no plaintiff could ever get past the pleadings stage. That is clearly not the law.

Second, Abbott contends that plaintiffs' allegation that the *Cascade* test has been satisfied should simply be disregarded because plaintiffs' allegations, Abbott believes, are somehow implausible and thus supposedly inconsistent with plaintiffs' obligations under Rule 11. (Abbott Mot. at 6.) Of course, Abbott cites no rule of pleading that requires dismissal of a complaint because the defendant believes that the allegations against it conflict with its own view of the evidence, nor could it. There is no such rule.

Further, not only is it improper for Abbott to casually wave around Rule 11 without actually following the procedures for lodging a complaint under that Rule, Abbott is simply and flatly wrong about the plausibility of plaintiffs' allegations. Indeed, while doing the economic analysis required by *Cascade* is wholly unnecessary and improper at the pleadings stage of this case (or any case), as explained in Part II, *infra*, Abbott's own statements and the few

internal documents plaintiffs have reviewed to date show quite clearly that plaintiffs' allegations in paragraph 41 are not only "plausible," but accurate. Though unnecessary to establish at this stage (given that the Court is required to accept plaintiffs' allegations as true), it is clear from the evidence reviewed to date that Abbott's conduct would indeed violate the *Cascade* test.

What this means is that plaintiffs will be able to show that they can meet a *higher* test than is required at this stage or any other, proving without a doubt that Abbott's conduct is not only improperly exclusionary under *Kodak*, but would clearly exclude equally efficient competitors, improperly enhance monopoly power, harm competition, and allow Abbott to charge supracompetitive prices. More specifically, plaintiffs have pled, and will show, that by using the leverage inherent in its Norvir monopoly, Abbott has improperly nullified the ability of Abbott's rivals to compete on the merits. Any effort by competitors to lower price or improve quality has been—and would continue to be, if permitted—met by an increase in the Norvir price, making such procompetitive efforts futile, and stifling price competition generally.

Third, as explained in Part III, *infra*, plaintiffs have also more than sufficiently alleged that, in advance of its plan to leverage its Norvir monopoly over to the boosted market, Abbott willfully maintained and/or enhanced its monopoly power in the boosting market by impeding the development of potential rivals and/or inducing a delay in the development of technologies to use lesser amounts of Norvir to boost other protease inhibitors. Abbott's only argument with respect to this claim is to repeat the failed argument it made with respect to plaitniffs' other claim: that it has a patent-protected monopoly on Norvir and thus could do whatever it wants with Norvir or its price. But plaintiffs are claiming that Abbott's exclusionary conduct extends *outside the scope* of its Norvir patents and improperly bolster Abbott's patent rights. As such, the conduct is clearly subject to antitrust scrutiny under well-established law.[2] *See, e.g.*, *In re Cardizem CD Antitrust Litig.*, 332 F.3d 896, 908 (6th Cir. 2003) (noting that "it is

[2] Abbott also argues that Federal Circuit precedent bars plaintiffs' monopoly leveraging claims. This argument should be rejected for the reasons stated at Section II.B.2 of the Omnibus Opposition, which plaintiffs incorporate herein by reference.

one thing to take advantage of a monopoly that naturally arises from a patent, but another thing altogether to bolster the patent's effectiveness in inhibiting competitors . . .").

Abbott's motion is without merit, and should be denied. Should the Court grant any aspect of Abbott's motion, plaintiffs respectfully request leave to amend.

STATEMENT OF THE CASE

The complaint alleges a classic case of monopoly leveraging: using monopoly power in one market to obtain, preserve or increase power in another, related market. In 1996, Abbott introduced Norvir, a protease inhibitor used to treat HIV. (¶ 11.) While introduced as a stand-alone treatment, today HIV patients primarily use Norvir to enhance, or "boost," the effects of other, complementary protease inhibitors. (¶ 13-15.) Norvir currently has no reasonable substitute for this purpose; Abbott therefore enjoys a monopoly in the one-drug market for "boosting" protease inhibitors. (¶¶ 17-18.)

Abbott also markets "Kaletra," a drug that combines both the active ingredient in Norvir (ritonavir) and also Abbott's own "boosted" protease inhibitor, lopinavir. (¶ 16.) Through mid-2003, Kaletra enjoyed more than three quarters of the market for "boosted" protease inhibitors. (¶ 19.) In 2002 and 2003, however, Abbott became increasingly concerned that new, competitor boosted protease inhibitors would be introduced to challenge the dominance of Kaletra, which carries with it the risk of significant side effects, including increased risk of heart attacks and strokes. (¶¶ 16, 20-21.) In direct response to the introduction of these competitor drugs, in 2003, Abbott—overnight, on December 3, 2003—raised the price of Norvir by 400%. (¶ 24.) Abbott did not raise the price of Kaletra, however. As a result of this price increase, rival boosted drugs were put at a severe disadvantage. Patients seeking to use Abbott's rival boosted drugs now had to pay a penalty for buying Norvir as a stand-alone product (as opposed to buying it as part of Kaletra). (*Id.*)

Abbott specifically intended that its massive price increase would impair competition to Kaletra. In the words of one executive, Abbott could not "continue to trade a prescription of Kaletra for a prescription of Norvir at 100 mg," ¶ 27, and needed to "[p]osition Kaletra as a more economical option for boosted ARV [anti-retroviral] therapy," ¶ 30. Notably,

Abbott considered other alternatives to impair its rivals, such as marketing stand-alone Norvir only in a liquid form that in Abbott's executives' own words "taste[s] like someone else's vomit." (¶ 29.) Abbott also engaged in numerous other pretextual and deceptive acts to disguise its activity. (¶¶ 26-33.)

Abbott's conduct had its intended effect on competition in the boosted market. Abbott successfully impaired the performance of boosted HIV treatments that competed with Kaletra, by inflating their effective cost to patients (because Abbott's boosted rivals had to be combined with the now mega-priced Norvir to be effective). (¶ 25.) As evidence of this effect, Abbott's plan succeeded in halting the decline in Kaletra's massive market share that had commenced with the attempted introduction of new, competing products. (¶ 39.) Abbott's conduct also precluded price competition in the market for boosted protease inhibitors. Abbott's rivals knew that if they cut prices to compete with Kaletra, Abbott could thwart competition by simply raising Norvir's price again (thereby nullifying the effect of any boosted price cut to steal share from Kaletra). (¶ 40.)

Indeed, throughout the complaint, plaintiffs allege that Abbott failed to compete on the merits. When faced with the prospect of superior products (and hence a potential loss in market share) in the boosted market, the procompetitive response would have been to lower Kaletra's price or improve quality or service. *E.g., Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 (1985) ("If a firm has been 'attempting to exclude rivals on some basis other than efficiency,' it is fair to characterize its behavior as predatory.") (quoting R. Bork, The Antitrust Paradox 138 (1978)). Plaintiffs specifically plead that Abbott could have responded in a procompetitive manner by lowering Kaletra's price or developing an improved formulation of Kaletra or an entirely new and more effective boosted protease inhibitor instead. But, Abbott did not respond procompetitively. Rather, Abbott *raised* the price of Norvir, a necessary component in the treatment regimes of competing boosted protease inhibitors, by several orders of magnitude, thereby punishing consumers and producers of competing boosted products.

As further proof of the anticompetitive effect of the Norvir price increase, the complaint alleges that:

> The following allegations are sufficient, but not necessary, to state a claim. On information and belief: (a) if the penalty a purchaser would pay on the required dosage of Norvir for buying a Boosted-PI from a supplier other than Abbott were subtracted from the imputed price of the Boosted-PI portion of Kaletra, then the resulting price would be below Abbott's average variable costs relating to the Boosted-PI portion of Kaletra; and (b) if Abbott had to pay its own market price for the ritonavir/Norvir that goes into Kaletra, Abbott's selling Kaletra at its current market price would not be profitable.

(¶ 41.)

Meanwhile, in advance of its efforts to leverage its Norvir monopoly over to the boosted market, Abbott had also engaged in anticompetitive behavior to maintain and enhance its monopoly in the boosting market. This power maintained in the boosting market furthered the exclusionary power of the leveraging scheme, because it meant that Abbott's boosted rivals would continue to be singularly reliant upon Norvir. Specifically, the complaint further alleges that Abbott maintained its monopoly power in the boosting market by departing from its well-established course of licensing and selling Norvir to other manufacturers of boosted protease inhibitors at a reasonable price. (¶ 34-38.) Abbott further abused its monopoly power in the boosting market by intentionally inducing its competitors into relying on Norvir's availability at Abbott's standard price and then suddenly increasing that price by more than 400%. Abbott developed this reliance by licensing to competitors – implicitly and explicitly – the right to market boosted protease inhibitors to be co-administered with Norvir. (*Id.*)

However, at the same time it was actively pursing licenses for Norvir, Abbott was also planning to change its established course of dealing by limiting Norvir's availability, by either removing it from the market altogether or drastically increasing its price to make it financially difficult to obtain (especially relative to purchasing Norvir as part of Abbott's Kaletra). Abbott did not disclose these plans to its actual or potential licensees, preferring that rivals continue to rely on Norvir, thereby further establishing Norvir as the *de facto* standard boosting agent. This conduct enhanced the ability of Abbott to leverage its Norvir monopoly and obtain monopoly power in the boosted market. Abbott's deceptive behavior deterred would-be competitors in the boosting market from developing potential boosting drugs to compete with

Norvir and/or PIs that required a smaller dosage of Norvir. (¶¶ 15, 18, 26-33, 34-37.) For instance, as a result of Abbott's misconduct GlaxoSmithKline did not obtain FDA approval for use of its boosted protease inhibitor (Lexiva) with a lower dosage of Norvir (100mg). (¶ 37.) Had boosted drugs worked with lower doses of Norvir earlier, Abbott's ability to leverage its Norvir monopoly over to the boosted market would have been less effective.

In sum, Abbott's conduct, taken as a whole, caused members of the plaintiff class to pay more for Norvir and Kaletra than they would have, had Abbott engaged in lawful competition (such as by competing in the boosted market by lowering the price of Kaletra). (¶ 71.)

ARGUMENT

I. The Consolidated Amended Complaint Satisfies *Twombly*

Abbott first contends that under *Bell Atlantic Corporation v. Twombly*, 127 S. Ct. 1955 (2007), paragraph 41 of plaintiffs' complaint lacks sufficient specificity and therefore must be ignored. To the contrary, both the complaint as a whole, and paragraph 41 in particular, contain specific allegations of exclusionary behavior that more than adequately state a claim under prevailing law, even if *Cascade* were held to apply. Moreover, plaintiffs' ability to show that a more stringent than legally required, cost-based *Cascade* test for assessing exclusionary conduct can be and has been met is further evidence that the conduct at issue harms competition and violates the antitrust laws.

A. *Twombly* Did Not Alter Federal Pleading Standards

First, contrary to Abbott's contentions, *Twombly* did not alter the basic rules governing Rule 12(b)(6) motions: "All allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party." *Silvas v. E*Trade Mortg. Corp.*, --- F.3d ---, 2008 WL 239422, *2 (9th Cir. 2008). "A complaint must not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief." *Id.*

In *Twombly* the plaintiffs had alleged an illegal horizontal agreement among competitors that had occurred at some unspecified place and time in the past. *Twombly*, 127 S.

Ct. at 1965-66. The purported competitors (the regional bell operating companies or "baby Bells") had, according to the plaintiffs, simply failed to expand beyond the "legacy" geographic markets in which they had previously enjoyed regulatory monopolies. The Supreme Court held in *Twombly* that this simple allegation of lawful, parallel behavior did not state a claim. *Id.* at 1966. Hence, the Court held,

> When allegations of parallel conduct are set out in order to make a § 1 claim, they must be *placed in a context* that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action.

Id. (emphasis added). The Court made sure to clarify, however that:

> Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of illegal agreement.

Id. at 1965. The Court also observed that a case should proceed even if proof of the alleged violation is improbable, and 'that a recovery is very remote and unlikely.' *Id.* (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)).

In *Erickson v. Pardus*, decided after *Twombly*, the Supreme Court confirmed that a plaintiff need only satisfy the notice pleading requirements of Rule 8: "[s]pecific facts are not necessary, the statement [of a claim] need only give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." 127 S. Ct. 2197, 2200 (2007) (citing *Twombly*) (internal quotations marks omitted).

Moreover, decisions interpreting *Twombly* and *Erickson* have hewed strictly to their collective admonition that the Supreme Court did not intend to create a new, heightened pleading standard for antitrust cases, and that notice pleading remains the rule in federal court. *See Airborne Beepers & Video, Inc. v. AT&T Mobility LLC*, 499 F.3d 663, 667 (7th Cir. Aug. 24, 2007) ("Taking *Erickson* and *Twombly* together, we understand the Court to be saying only that at some point the factual detail in a complaint may be so sketchy that the complaint does not provide the type of notice of the claim to which the defendant is entitled under Rule 8."); *Brickey v. Dolencorp, Inc.*, 244 F.R.D. 176, 178 (W.D.N.Y. August 29, 2007) (holding that *Twombly* does

not require plaintiffs to "concretely prove all of the specifics"); *Roth v. Jennings*, 489 F.3d 499, 515 (2d Cir. June 6, 2007) (rejecting the need for detailed allegations); *E.E.O.C. v. Concentra Health Services, Inc.*, 496 F.3d 773, 779 (7th Cir. 2007) (noting that the "fair notice" language of *Conley* and *Twombly* was a "classic verbal formula" that "capture[d] a mood of liberal pleading that is enough to settle the sufficiency of most federal complaints") (internal quotation marks and citations omitted). In sum, contrary to the basis of Abbott's motion, *Twombly* does not fundamentally alter the pleading standards for antitrust cases.

B. The Complaint Meets and Exceeds the Requirements of Rule 8

Second, even if *Twombly* had, *arguendo*, created a heightened pleading standard, plaintiffs' complaint would satisfy it. Abbott's criticism that the complaint advances only a "barebones allegation" of exclusionary pricing is wholly without merit. To the contrary, plaintiffs allege that Abbott responded to the threat posed to its monopoly power in the boosted market by quadrupling prices for Norvir on December 3, 2003 (¶ 24); that Abbott did so with the specific intent of making Abbott's rival products in the boosted market more expensive to use (because they had to be used in conjunction with Norvir), and thereby improperly impairing those rivals' ability to compete with Kaletra, not by lowering Kaletra's price or improving Kaletra's quality, but through leveraging monopoly power. This conduct, plaintiffs allege, enhanced Kaletra's market share and monopoly power. (¶ 26.) Plaintiffs allege further that Abbott executives stated they raised prices on Norvir because "Abbott could not 'continue to trade a prescription of Kaletra for a prescription of Norvir,'" ¶ 27—*i.e.*, Abbott would not countenance any eroding of its market share in the boosted market; and that Abbott invented deceptive and pretextual explanations for its extraordinary price-hike, ¶¶ 28-32.

Moreover, plaintiffs plead further that Abbott's conduct harmed competition in the boosted market, halting and then reversing Kaletra's decline in market share and allowing Abbott to charge supracompetitive prices. (¶ 24.) Finally, plaintiffs alleged that if Kaletra were considered a "bundle" of Norvir and lopinavir, and if the price of Norvir/ritonavir "bundled" with liponavir as part of Kaletra was (counterfactually) considered a "discount," the test could be applied, and if applied, satisfied. Plaintiffs specifically plead that if the new, quadrupled price of

Norvir as a stand-alone product were subtracted from the price of Kaletra, it would render the imputed price of the lopinavir component of Kaletra below Abbott's average variable costs. (¶ 41.)

Thus, plaintiffs adequately and sufficiently plead satisfaction of the actual test set out in *Cascade*, which is all that is and should be required at the pleading stage. Moreover, plaintiffs allege facts that more than plausibly suggest that Abbott quadrupled the price of Norvir with the intent and actual effect of impairing and/or excluding competition in the boosted market. Abbott was certainly able to understand plaintiffs' allegations in this regard, having summarized plaintiffs' paragraph 41 as follows: "In other words, the Meijer Plaintiffs claim that when you take out the cost of the Norvir component of Kaletra after the price increase, Abbott is offering the 'boosted' (or lopinavir) component of Kaletra at a price that falls below its costs of producing that component." (Abbott Mot. at 4.) As long as "producing" in that sentence includes average variable costs, such as marketing and distribution, Abbott has precisely understood plaintiffs' very specific allegation. Rule 8 therefore clearly has been satisfied. Abbott's motion therefore must be denied.

C. **Plaintiffs Adequately Plead Satisfaction of *Cascade***

Abbott's real "grievance" about the complaint appears to be that even though plaintiffs plead satisfaction of the *Cascade* test, plaintiffs did not "show their work" and lay out all of the steps of the actual computation, including specific allegations regarding Abbott's actual average variable costs to the penny (even though, as Abbott itself has acknowledged, plaintiffs' allegations implicitly incorporate allegations about Abbott's pricing).

Unsurprisingly, Abbott fails to cite a single case dismissing at the pleading stage an allegation of pricing below appropriate measures of cost. *Cascade* itself reviewed a district court's opinion on summary judgment and after trial. *Cascade*, 2008 WL 269506 at *2. At the summary judgment (or trial) stage, plaintiffs will have had the benefit of discovery, and the assistance of expert analysis, to pinpoint Abbott's average variable costs with specificity. At this early stage, when plaintiffs' allegations must be read in the light most favorable to plaintiffs, no more is necessary than plaintiffs' well-founded allegations in paragraph 41.

Indeed, the detailed and factual nature of this inquiry makes it especially inappropriate to analyze at the pleadings stage. In *Cascade*, the Ninth Circuit held that "[t]o prove that a bundled discount was exclusionary or predatory for the purpose of a . . . [Section 2] claim, the plaintiff must establish that, after allocating the discount given by the defendant on the entire bundle of products to the competitive product or products, the defendant sold the competitive product or products below its average variable cost of producing them." *Cascade*, 2008 WL 269506 at *18. And, plaintiffs explicitly plead that, if the *Cascade* test applies, Abbott's exclusionary pricing scheme meets its criteria for anticompetitive conduct. As plaintiffs allege:

> The following allegations are sufficient, but not necessary, to state a claim. On information and belief: (a) if the penalty a purchaser would pay on the required dosage of Norvir for buying a Boosted-PI from a supplier other than Abbott were subtracted from the imputed price of the Boosted-PI portion of Kaletra, then the resulting price would be below Abbott's average variable costs relating to the Boosted-PI portion of Kaletra; and (b) if Abbott had to pay its own market price for the ritonavir/Norvir that goes into Kaletra, Abbott's selling Kaletra at its current market price would not be profitable.

(¶ 41.)

Plaintiffs allege, in other words, that if the Court were to find that *Cascade* applies and Kaletra were viewed as if it were a "discount bundle" of Abbott's boosting and boosted drugs, the *Cascade* test would be satisfied. In other words, by raising the price of Norvir when purchased separately from Kaletra, and then keeping the price of Kaletra stable, Abbott effectively sells Norvir/ritonavir at a much higher price when it is purchased separately from Abbott's Kaletra "bundle."

To apply *Cascade* here, therefore, the relevant inquiry would be as follows: (a) take the price that a customer would have to pay for the Norvir in Kaletra if bought separately, and (b) subtract the amount determined in "a" from the price of Kaletra to get the effective price at which Abbott is selling lopinavir (the "imputed lopinavir price"), the boosted part of Kaletra. One would then take the imputed lopinavir price computed in "b" and compare that to the average variable costs associated with Abbott's sales of its boosted product. If Abbott's own average

variable costs are higher than the imputed price for which it is selling lopinavir (and conversely, Abbott's imputed price is below the relevant costs), then Abbott is selling at a price that violates *Cascade*. Abbott does not disagree with this formulation of the test or how it should be applied here. (*See* Abbott Mot. at 6.) That is precisely what plaintiffs did and what plaintiffs have pled. Nothing more is or could be reasonably required at this stage of the case.

To the extent Abbott takes issue with plaintiffs' satisfaction of the test, that debate can not and should not occur *before* discovery of Abbott's financial records and in advance of expert analysis. For one, the categorization of expenses as variable or fixed (as one must do in order to conduct the *Cascade* analysis) is dependent on "the actual situation [of] the seller," and thus "is impossible to determine in advance and outside the specific factual context . . . [.]" *D.E. Rogers Assocs. v. Gardner-Denver Co.*, 718 F.2d 1431, 1437 (6th Cir. 1983). Not only is the allocation of costs as either fixed or variable done on a case-by-case basis, but it is distinctly a question for the jury to decide under appropriate instructions. *William Inglis & Sons Baking Co. v. ITT Continental Baking Co., Inc.*, 668 F.2d 1014, 1038 (9th Cir. 1981). This issue cannot and should not be resolved on the pleadings.

Furthermore, prior to discovery and expert analysis, no plaintiff who did not have access to a monopolist's detailed and confidential records could reasonably provide more specificity than plaintiffs here already have about a critical aspect of the underlying test: Abbott's average variable costs for Kaletra. While Plaintiffs can (and have) made an educated analysis of Abbott's likely margins and cost structure based upon economic insights and publicly available information (and as shown below, now essentially confirmed *by Abbott's own motion as well as internal documents reviewed to date*), details about Abbott's average variable costs are, almost by definition, within the exclusive possession and control of Abbott. The Ninth Circuit itself recognized this very fact as a feature of its holding: it allows the incumbent firm deciding whether or not to engage in discount bundling to have within its own possession all of the information necessary to "calculate whether its discounting practices run afoul of the [Court's] rule." *Cascade*, 2008 WL 269506 at *17. Those potentially injured by the incumbent's practices generally cannot plead—at the outset of a case and prior to discovery—satisfaction of the

Cascade test with the kind of specificity Abbott would apparently have this Court require. Plaintiffs can only do what Plaintiffs here did: conduct an analysis based upon publicly available information sufficient to allege satisfaction of the test, and comply with their general pleading obligations by putting Abbott on notice of the claims against it.

Neither *Twombly*, nor *Erickson*, nor *Cascade*, nor any other case, supports the proposition that a plaintiff should be denied all remedy for facially anticompetitive behavior simply because it did not do the impossible: obtain access to the defendant's confidential, internal, proprietary cost data *before* filing a complaint. Indeed, if the rule Abbott seeks to impose became law, *Cascade* would effectively immunize conduct that the Ninth Circuit believed was clearly harmful to competition because a plaintiff would rarely, if ever, be able to get past the pleadings stage. Of course, as discussed below, plaintiffs have now been able to obtain access to some of Abbott's internal cost documents (due to the cases that were pending prior to plaintiffs' action)—and those documents *confirm* plaintiffs' allegations relating to satisfaction of *Cascade*.

In sum, Abbott does not—and cannot—seriously argue that the complaint is so "sketchy" that it cannot divine the allegations relevant to the *Cascade* analysis. In fact, Abbott knows *exactly* what Plaintiffs have alleged, and believes it can calculate *to the penny* what it views as its defense to the allegations of exclusionary pricing. (*See* Abbott Mot. at 6, allocating discount of $17.14 to $18.78 price of Kaletra). The motion should therefore be denied.

II. Plaintiffs' *Cascade* Allegations Are Not Only Plausible, But Confirmed By the Record Reviewed to Date

Faced with the manifest specificity of the complaint, Abbott tries to distract the Court by inviting it set aside plaintiffs' allegations and then perform a truncated *Cascade* analysis without evidence, expert analysis, and based on Abbott's proffered "assumptions" about the nature of variable costs in the pharmaceutical industry. Abbott goes on to allude to Rule 11, darkly implying that plaintiffs' counsel have somehow violated their professional obligations by even suggesting that Abbott has engaged in exclusionary pricing under *Cascade*. (*See* Abbott Mot. at 6, arguing that to allege that Abbott discounted below the variable cost of lopinavir would

not be "consistent with [plaintiffs' counsel's] Rule 11 obligations.")[3] Abbott in effect asks the Court to treat its motion to dismiss as a motion for summary judgment. Simply stating this proposal should be enough to refute it; however, in light of Abbott's invocation of Rule 11 plaintiffs feel constrained to point out that Abbott's own motion papers, as well as some of its own internal documents regarding Abbott's costs, confirm the plausibility of plaintiffs' allegations and that Abbott's costs substantially exceed its own, proposed cost threshold.

Abbott, "through simple arithmetic" and the allegations in plaintiffs' complaint, was able to determine one side of the exclusionary pricing formula: the imputed price of $1.64 for the lopinavir component of Kaletra. (Abbott Mot. at 6.) In other words, Abbott has now acknowledged that a rival in the boosted market with the same cost structure as Abbott—*i.e.*, that is "equally efficient"—would need to be able to sell its boosted protease inhibitor, profitably, at $1.64 per unit. Put another way, if Abbott's average variable costs are greater than $1.64 per unit, then Abbott is effectively selling lopinavir below its costs, and thereby gaining an unfair advantage in the boosted market through its Norvir monopoly.

Thus, the remaining *Cascade* question is: using Abbott's price computation for purposes of discussion, are Abbott's average variable costs (appropriately conceived) in excess of $1.64 per unit? Curiously, putting Abbott's rhetoric aside, while Abbott alludes to the supposed implausibility of its costs being that "high," Abbott itself *says nothing about what its own costs actually are or even whether those costs exceed $1.64 per unit.* In other words, even though that information is surely available to Abbott (and, at this point, uniquely so), Abbott's motion does not even squarely contest plaintiffs' allegation that upon doing the computation provided by *Cascade* ". . . the resulting price [of the boosted portion of Kaletra] would be below Abbott's average variable costs relating to the Boosted-PI portion of Kaletra." (¶ 41.)

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[3] The allusion to Rule 11 in a motion to dismiss (as opposed to a separately noticed motion) violates the Rule and is surely the last gasp of the desperate litigant. Rule 11 "should not be employed as a discovery device or to test the legal sufficiency or efficacy of allegations in the pleadings; other motions are available for those purposes. . . . The rule provides that requests for sanctions must be made as a separate motion, *i.e.*, not simply included as an additional prayer for relief contained in another motion." Fed. R. Civ. Pro. 11, Advisory Committee Notes to 1993 Amendments, subd. (b) and (c).

Furthermore, Abbott's suggestion of implausibility is not only made without evidence, it is founded on an entirely inaccurate and, what will be, at minimum, contested premise: that the only costs relevant to the average variable cost computation for the *Cascade* computation are those relating solely to the manufacturing of lopinavir. Abbott argues that "under *Cascade*, [] Plaintiffs must plead at least that it costs Abbott more than $1.64 *to manufacture* just the lopinavir portion of a Kaletra pill." (Abbott Mot. at 6, emphasis changed.) Abbott provides no support for that proposition whatsoever, nor could it. As discussed below, average variable costs include far more than simply manufacturing. Indeed, in the very same paragraph in which Abbott advances this spurious argument, Abbott cites a case, *United States v. Generix Drug Corp.*, 460 U.S. 453 (1983), that refers to the "research, development, *and promotional costs* normally associated with the creation *and marketing* of a [brand name drug]." *Id.* at 455 n.1 (emphases added). (Abbott Mot. at 6.)[4]

Plaintiffs can (and do) certainly plausibly allege that the set of such average variable costs for Kaletra (less the average variable costs solely applicable to the ritonavir/Norvir portion of Kaletra) exceed $1.64.[5]

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[4] In fact, average variable costs have long been defined in economics and law as those which vary with output and those which a firm would have to consider when contemplating a change in output. *Inglis*, 668 F.2d at 1037. Those costs can include, in addition to manufacturing costs, "capital, executive, and administrative costs, sales expenses, and some elements of promotional expense[.]" *Rebel Oil Co., Inc. v. Atlantic Richfield Co.*, 133 F.R.D. 41, 43 n.2 (D. Nev. 1990). Advertising and other marketing expenses relate "directly to immediate output" and thus must be part of the cost computation for *Cascade*. *See* Phillip E. Areeda & Herbert Hovenkamp, III Antitrust Law ¶ 740d2 (Little Brown & Co, rev ed. 2007) (discussing advertising and promotional as variable costs); *cf. IMSX Health Inc. v. Ayotte*, 490 F. Supp. 2d 163, 167 (D.N.H. 2007) (pharmaceutical companies spend substantial amounts on promotion).

[5] Because Kaletra includes ritonavir/Norvir (for boosting) combined with lopinavir (Abbott's boosted drug), the relevant costs may be only those average variable costs associated with Abbott's selling its boosted product into the boosted market. Accordingly, that would include all average variable costs associated with Kaletra other than those specifically attributable to ritonavir/Norvir. (¶ 41.)

The evidence thus shows that *Cascade* is clearly satisfied, thereby bolstering plaintiffs' allegations.[6]

In sum, plaintiffs plausibly and in good faith have alleged that Abbott has engaged in exclusionary pricing under *Cascade*. This allegation is sufficient (though not legally necessary), and nothing more is required at this juncture. Abbott's motion to dismiss should be denied even if this Court rules that *Cascade* applies in non-discounting cases such as this one.

III. Plaintiffs Sufficiently Plead Monopolization of the Boosting Market

The direct class plaintiffs further, and separately, allege that Abbott improperly maintained and/or enhanced its monopoly power in the boosting market. (Complaint ¶¶ 18, 68-71.) This enhanced power made Abbott's rivals in the boosted market more reliant upon Norvir than they otherwise would have been, and thus furthered Abbott's scheme to leverage its (enhanced) monopoly power in the boosting market to maintain and/or enhance monopoly power in the boosted market.

Plaintiffs sufficiently allege this claim. A claim of monopolization requires proof that: (1) Abbott possessed monopoly power in the boosting market, and (2) Abbott willfully maintained that power. *Image Tech. Servs. v. Eastman Kodak Co.*, 125 F.3d 1195, 1202 (9th Cir. 1997). Plaintiffs allege, and Abbott does not contest, that it controls 100% of the boosting market. (Complaint ¶¶ 18, 44.) Plaintiffs further allege Abbott improperly maintained its

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[6] Put differently, Kaletra is priced at $18.78. *Id.* Dividing the $1.64 imputed price of the lopinavir component by Kaletra's $18.78 price yields a percentage of 8.7%. In plain English, the lopinavir component of Kaletra is priced at 8.7% of Kaletra's total price. Therefore, if Abbott's average variable costs of Kaletra are above 8.7% of Kaletra's price, Abbott has engaged in exclusionary pricing under *Cascade*. For Abbott to *not* be engaged in exclusionary pricing under *Cascade*, it would need to enjoy margins of 91.3% (1 – 8.7%) on its sales of Kaletra. The

monopoly power in the boosting market by inducing rivals to rely on Norvir through Abbott's well-established course of selling Norvir at a reasonable price, and licensing for co-promotion to manufacturers of boosted protease inhibitors, and then reversing course with its massive price increase. Abbott does not contest that this exact type of conduct has been held to violate Section 2. *E.g.*, *Aspen Skiing Co.*, 472 U.S. at 603 (finding a violation of Section 2 where "the monopolist elected to make an important change in a pattern of distribution that had originated in a competitive market and had persisted for several years"); *Kodak*, 125 F.3d at 1211.

Instead, Abbott's entire argument is that since Abbott has patents on Norvir, it can do what it wants with Norvir. This contention has no merit, and thus Abbott's motion to dismiss this claim should be denied.

First, plaintiffs are *not* challenging Abbott's conduct relating to its patents on Norvir. Rather, plaintiffs are challenging misuse of monopoly power. Just as leveraging monopoly power from one market to another can violate Section 2 of the Sherman Act (regardless of whether that monopoly power was obtained through patent rights or otherwise), improperly wielding monopoly power within a market can also violate Section 2. *E.g.*, *Aspen Skiing*. More specifically, plaintiffs *are* challenging Abbott's use of its patent-protected monopoly to impede the development of potential rivals for Norvir and/or technologies to reduce the amount of Norvir used as a boosting agent. Abbott abused its monopoly power in the boosting market by deliberately lulling its competitors into relying on Norvir's availability at Abbott's standard price and then yanking the rug out from underneath them by increasing Norvir's price by more than 400%.[7]

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[7] Abbott half-heartedly argues that plaintiffs' claims regarding the boosting market (where, according to Abbott, Norvir use was encouraged) are inconsistent with plaintiffs' claims regarding the boosted market (where, according to Abbott, Norvir use was discouraged). (Abbott Mot. at 2.) Abbott's argument ignores the timing involved in each claim. Abbott's anticompetitive conduct in the boosting market occurred prior to the December 3, 2003 price increase as Abbott induced would-be competitors in the boosting market to rely on Norvir. Abbott's anticompetitive conduct in the boosted market began with the December 3, 2003 price increase on Norvir and continued as Abbott leveraged its monopoly position in the boosting market – which was now stronger due to the conduct at issue – to impede rivals to Kaletra in the boosted market.

Abbott cultivated this reliance by implicitly and explicitly licensing to competitors the right to market boosted protease inhibitors to be co-administered with Norvir.[8] Specifically, in 2001 and 2002, Abbott approached Bristol-Myers Squibb Co., GlaxoSmithKline, and other actual and potential competitors in the boosted market about procuring licenses from Abbott for the right to label and market their existing boosted protease inhibitors, and any boosted protease inhibitors in development, with Norvir. Abbott successfully persuaded GlaxoSmithKline into entering into a license agreement for Norvir in December 2002, which generated a substantial profit for Abbott. Abbott, meanwhile, was secretly plotting to change its established course of dealing by limiting Norvir's availability by either removing it from the market altogether or drastically increasing its price to make it financially difficult to obtain. Abbott did not disclose these plans to GlaxoSmithKline or any other actual or potential licensees, preferring that they continue to rely on Norvir as the *de facto* standard boosting agent. As a result of Abbott's scheme, would-be competitors in the boosting market, including GlaxoSmithKline, delayed developing potential boosting drugs to compete with Norvir and/or protease inhibitors that required a smaller dosage of Norvir.[9] (¶¶ 15, 18, 26-33, 34-37.)

The disconnect between Abbott's public actions to promote and profit from the use of Norvir by other manufacturers of boosted protease inhibitors and its undisclosed plan leading to its announcement of eventual price increases to limit access to Norvir forms the crux of Plaintiffs' Section 2 claims with respect to the boosting market. Plaintiffs allege that Abbott deceived would-be competitors into adopting Norvir as their boosting agent and then changed its voluntary and profitable course of dealing for the purpose of hindering competition. Because potential competitors were delayed in developing rival boosting drugs and/or PIs that required a

[8] Abbott has admitted that five of its competitors have express licenses for Norvir but disputes that it has impliedly granted licenses. *In re Abbott Laboratories Norvir Antitrust Litig.*, 442 F. Supp. 2d 800, 810-11 (N.D. Cal. 2006) (concluding that there is a dispute on summary judgment as to whether Abbott has impliedly licensed Norvir).

[9] In October 2007, GlaxoSmithKline did receive FDA approval for Lexiva boosted with 100 mg of Norvir as opposed to the standard 200 mg dose of Norvir. If Abbott had not wrongly induced GlaxoSmithKline into a licensing agreement for Norvir in December 2002 and led GlaxoSmithKline to believe that Norvir would be available at Abbott's usual price, GlaxoSmithKline would have developed and obtained FDA approval for Lexiva with 100 mg of Norvir significantly earlier. (¶ 37.)

smaller dosage of Norvir, competition was stifled in the boosting market and Plaintiffs were forced to pay artificially inflated prices for Norvir.

Abbott seeks refuge behind the fact that it obtained patents on Norvir. This is without merit. Abbott's conduct described above does *not* relate to its patents on Norvir or depend on its patents on Norvir. It is thus subject to antitrust scrutiny. *United States v. Masonite Corp.*, 316 U.S. 265, 277 (1945) ("A patent affords no immunity for a monopoly not fairly or plainly within the grant."); *In re Cardizem*, 332 F.3d at 908 (noting that "it is one thing to take advantage of a monopoly that naturally arises from a patent, but another thing altogether to bolster the patent's effectiveness in inhibiting competitors"); *In re K-Dur Antitrust Litig.*, 338 F. Supp. 2d 517, 532 (D.N.J. 2004) (denying defendants' motion to dismiss where plaintiffs' claims involved conduct "in excess of those rights granted by the patent"); *In re Ciprofloxacin Hydrochloride Antitrust Litig.*, 166 F. Supp. 2d 740, 749 (E.D.N.Y. 2001) ("[I]t cannot be stated that the patent 'exception' swallows the prohibitions against monopolies and trusts as a whole; even the holder of a valid patent may be subject to liability for conduct amounting to an unreasonable restraint of trade."). Abbott concedes this is the prevailing law. (Abbott Mot. at 7.) In fact, Abbott is no stranger to antitrust liability for anticompetitive conduct outside the grant of its patents. *See In re Terazosin Hydrochloride Antitrust Litig.*, 352 F. Supp. 2d 1279, 1319 (S.D. Fla. 2005) (holding that Abbott's conduct "exceeded the scope of the protections afforded Abbott under the '207 patent . . ." and constituted a *per se* violation of the Sherman Act).

Plaintiffs allege that Abbott engaged in a pattern of inducing would-be competitors to rely on Norvir while internally planning to either remove Norvir from the market or substantially increase its price, thereby harming rivals in the boosted market reliant upon Norvir, and improperly advantaging Kaletra. That conduct has nothing to do with Abbott's patent rights, and everything to do with misuse of monopoly power. Abbott's effort to dismiss Plaintiffs' claims regarding the boosting market by distorting the allegations and hiding behind its patent must be rejected.

CONCLUSION

For the foregoing reasons and those set out in the Plaintiffs' Joint Opposition to the Omnibus Motion, Abbott's motion should be denied.

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